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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938.

No. 509

DENIS J. DRISCOLL, THOMAS C. BUCHANAN,
DONALD M. LIVINGSTON, RICHARD J. BEAM-
ISH AND JOHN SULLIVAN, INDIVIDUALLY, AND AS
THE PERSONS CONSTITUTING THE PENNSYLVANIA
PUBLIC UTILITY COMMISSION,

AND

UTILITY CONSUMERS LEAGUE OF YORK, PA.,
Appellants,

v.

EDISON LIGHT & POWER COMPANY,
Appellee.

APPELLEE'S SUPPLEMENTAL BRIEF

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v.

EDISON LIGHT & POWER COMPANY,

Appellee.

APPELLEE'S SUPPLEMENTAL BRIEF

**A. Misunderstanding and Misstatements Concern-
ing the Question of Confiscation.**

Because of a misunderstanding by Appellee's counsel
on the argument, there may have been left with the Court
an impression that Appellee *concedes* that upon the re-
turn allowed by the Commission's order, it will earn 6½%
on Appellee's claimed minimum fair value of \$5,866,081.*
Appellee makes no such concession, for this is not the fact.

* See Appellee's main brief, pp. 108, 109.

The Commission submitted to the Court a photostatic tabulation which purports to show that, under its order, there is allowed a return of \$405,706, which concededly would be approximately 61½% of the minimum fair value claimed by Appellee; and to show that, on Appellee's figures, the order was non-confiscatory. However, *the Commission's tabulation does not reflect the true return allowed by its order, nor the true figures on which Appellee relies*; and any possible unintended concession, made on the basis of its correctness, must, in fairness to the Appellee, be disregarded by the Court.

In the first place, the \$405,706 available return, stated in the Commission's tabulation contradicts its order which made available a return of \$384,500. What is even more important, it *assumes* that an allowance had been made for all proper operating expenses. The amount of the operating expenses *disallowed* is \$214,057.*

Appellee's claims with respect to these items are set forth at pages 103-105, and 108 of its main brief, and need not here be repeated. Appellee's evidence with respect thereto is uncontradicted of record. But what is here most important to be noted is, that if the Appellee's claims are allowed, then the Commission's order limits it to a return, *not of 61½% on the fair value of its property, but of 2.90%,** 4.9% or 5.33%*, depending upon the period of amortization, if any, of rate case expense. The following tabulation makes this clear:

* * Includes \$15,089 loss of profit from street railway abandonment.

** The finding of the court below that the rate of return allowed by the Commission's order was 3.27% is not supported in this Court because the court below mistakenly allowed taxes of \$185,000 annually instead of \$206,400, as computed by the Commission (R. 36). The correct finding should have been 2.90%.

RATE OF RETURN COMPARISON BASED ON A MINIMUM
FAIR VALUE OF \$5,866,081.

	Income	Rate of Return
Operating Revenues—12 Months ended September 30, 1937 (R. 33)	\$2,202,329	
Rate Reduction Ordered by Commission (R. 38)	435,000	
	<u>\$1,767,329</u>	
Deductions allowed by Commission:		
Operating Expenses (R. 37) \$1,033,898		
Taxes (R. 37) 206,400		
Retirement Expense (R. 37) 142,531	<u>1,382,829</u>	
Available for Return as set forth in Com- mission's temporary rate order dated No- vember 30, 1937	\$ 384,500	6.55%
Deductions disallowed by Commission:		
Increased annual salary ex- pense to officers and em- ployees (R. 34) \$ 20,593		
Loss of annual profit by rea- son of abandonment of rail- way service by York Rail- ways Company, (R. 1018) 15,089		
Actual rate case expenses re- corded on books to Novem- ber 15, 1937 (R. 32, 1037) 178,375	<u>214,057</u>	
Available for Return on basis of absorbing rate case expense in one year	\$ 170,443	2.90%
Amortization of the rate case expense over a three year period would increase the return by	<u>118,917</u>	
Available for Return on basis of three year amortization	<u>\$ 289,360</u>	4.93%
Amortization of the rate case expense over a five year period would increase the return by	\$ 142,700	
Available for Return on basis of five year amortization	<u><u>313,143</u></u>	5.33%

The photostatic tabulation submitted by the Commission is unsupported by the record. **But of greater consequence to the Appellee is the tabulation's misstatement of Appellee's contentions**, both on the basis of reproduction cost and original cost.

It *understates* Appellee's reproduction cost base by over \$500,000:

FIRST: It fails to show Appellee's concession of the correctness of the Commission's allowance of \$164,000 for working capital.

SECOND: It fails to give effect to Appellee's evidence of rise in price levels between November 30, 1936, the date of the reproduction cost estimate, and the final hearing.*

THIRD: It fails to give effect to net additions of \$142,851 between November 30, 1936 and the final hearing.

In stating the *Commission's* position, which ignores the uncontradicted evidence of the second and third items, *supra*, the tabulation:

(1) Ignores the only substantial record evidence of indirect costs, resulting in a reduction of \$212,807

(2) Makes no allowance for going concern value of \$400,000.

The photostatic tabulation *misstates* Appellee's original cost base:

FIRST: It deducts \$349,000 for cost of financing.**

SECOND: It fails to include \$142,851 for net additions.

THIRD: It fails to include any allowance for going concern value.

* See *McCart v. Indianapolis Water Co.*, 302 U. S. 419 (1938).

** See Appellee's main brief, pp. 89 to 90 for a discussion of this item.

True comparison of original cost estimates is further rendered impossible by the Commission's attempt to depreciate original cost, which is non-depreciable.

To the Commission's attempt to show by a tabulation that, if its treatment of rate base, rate of return, and allowable expenses is correct, its order is non-confiscatory, we do not object; for it is open to the Appellee to show the error of the Commission's actions, as it has done. **But we most strenuously object to any attempt to show that the order is non-confiscatory on the basis of Appellee's claims, by misstating or failing to state those claims in full.** It is because the Commission has seen fit to do just this, that we assert that *the purported comparisons in the photostatic tabulation are misleading, and should be ignored*; and for the same reason we refer the Court to the tabulation printed on page 3 hereof for a correct statement of Appellee's contentions.

It appears clearly from the foregoing that Appellee's claim of confiscation is *substantial*; that it is in no sense a mere attenuated assertion which is dissipated by examination of the record. Indeed, in this regard, we urge earnestly that the record be carefully examined;—for tested by such an examination not only are Appellee's contentions with respect to confiscation established, but the Commission's findings as to rate base and rate of return are shown to be unsupported by substantial evidence.

Appellee has never deemed it necessary or proper to establish the *quantum* of confiscation. Indeed, the calculations made herein are not intended to fix the exact fair value or fair return which should have been found by the Commission. They are intended to, and we believe they do, establish that upon a most conservative valuation and treatment of operating expenses, *the return allowed by the Commission is far less than fair*, and that confiscation to

a considerable degree must result from the enforcement of the Commission's order. But this Court has uniformly held, and Appellee asserts in reliance on such holdings, that the judicial inquiry, on a claim of denial of due process, extends first to a determination of whether due process has been afforded in the procedural sense—whether there has been a fair hearing, and whether the determination has been made on the evidence, or arbitrarily either without substantial evidence, or in clear disregard of it.* In this case the Commission's arbitrary action, contrary to and in the absence of substantial evidence, is plain,** and requires an affirmance of the decree below independently of any consideration of the question of confiscation *vel non*.

B. The Questions to be Decided Antecedent to Any Consideration of Confiscation.

It is respectfully submitted that in this case there are several other independent questions to be decided by the Court *antecedent* to the consideration of confiscation, and that *only in the event that all these antecedent questions*

* See, *West v. Chesapeake & P. Tel. Co.*, 295 U. S. 662 (1935), and *Northern Pacific Ry. Co. v. Dept. of Public Works*, 268 U. S. 39 (1925), in neither of which cases was there a finding of confiscation, but in both of which commission orders were held to have constituted a denial of procedural due process. In the latter case, at page 44, this Court said:

"The mere admission by an administrative tribunal of matter which under the rules of evidence applicable to judicial proceedings would be deemed incompetent, *United States v. Abilene & Southern Ry.*, 265 U. S. 274, 288, or mere error in reasoning upon evidence introduced, does not invalidate an order. But where rates found by a regulatory body to be compensatory are attacked as being confiscatory, Courts may enquire into the method by which its conclusion was reached. An order based upon a finding made without evidence, *The Chicago Junction Case*, 264 U. S. 28, 263, or upon a finding made upon evidence which it only does not support it, *Interstate Commerce Commission v. Union Pacific R.R.*, 222 U. S. 541, 547, is an arbitrary act against which courts afford relief. The error under discussion was of this character. It was a denial of due process." (Italics ours.)

See also:

St. Joseph Stockyards Co. v. U. S., 298 U. S. 38 (1938).

are decided adversely to the Appellee does the question of confiscation become pertinent.

In the first place, if, as Appellee contends, the Commission did not comply with the only section of the law under which it is empowered to act at all, its order is a nullity. While the construction of the statute is a local question, never considered by the Courts of the Commonwealth, it is nevertheless the *primary* question for decision in this Court.*

In the second place, even if it be first decided that the Commission properly construed Section 310 in proceeding under subparagraph (a) thereof, this Court must then decide the constitutionality of the law. In this connection, we respectfully direct the Court's attention to Appellee's main brief, pages 27 to 59, wherein is discussed the unconstitutionality of the law as a delegation of unlawful powers under the Federal Constitution,** as an unlawful delegation of powers under the State Constitution, and as a denial of the equal protection of laws under both Federal and State Constitutions. If the statute be unconstitutional, the Commission's order is wholly void.

Only if all these questions of law are decided adversely to Appellee is the Court required to concern itself with the record as a whole—first, to determine whether the

* It has uniformly been held that where a Federal court takes jurisdiction of an application to enjoin the enforcement of a State Commission's rate order on Federal Constitutional grounds, that court has jurisdiction to pass on all questions raised, even though they concern merely the construction of a state statute.

Siler et al. v. Louisville & Nashville R.R. Co., 213 U. S. 175 (1909).

Greene v. Louisville & N. R.R., 244 U. S. 499, 508 (1917).

Frist v. Chicago & N. W. P. Ry. Co., 270 U. S. 378, 387 (1926).

California Water Service Co. v. City of Redding, 304 U. S. 252 (1938).

** In this connection, it should be noted that the unconstitutionality appears on the face of the statute, without reading into it a word, or changing a comma; and that only by reading into the statute words which nowhere appear, and words which are directly contradictory to the plain legislative intent (i.e. the words "just and reasonable"), can the statute be constitutionally construed. See Appellee's main brief, pages 49-50.

Commission acted properly, with a fair hearing, and a decision based on substantial evidence, and second, to determine whether the result of the Commission's action was a denial of substantive due process of law; or confiscation.

Conclusion

Appellee's case in this Court does not depend on the maintenance of a chain of interdependent legal propositions, but rather upon the establishment of any one of a number of *completely independent* propositions. We believe each of them is firmly rooted in correct legal principles correctly applied to the statutes and facts before the Court. We respectfully submit, however, that a consideration of these propositions in what we believe to be the logical order here suggested will relieve this Court of the unnecessary burden of reviewing a voluminous record, and should result in the affirmance of the decree of the Court below.

Respectfully submitted,

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